INDEX

Page

Questions presented 1
Statement 2
1. *Tonasket* v. *Thompson* 2
2. *Nicholson* v. *Laramie* 3
Discussion 4
Conclusion 10

CITATIONS

Cases:

Afroyim v. *Rusk*, 387 U.S. 253 2

Barr v. *Matteo*, 360 U.S. 564 7

Barta v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553 5

Bivens v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 6

Brown v. *United States*, 486 F. 2d 658 9

Colliflower v. *Garland*, 342 F. 2d 369 5

Daly v. *United*, 483 F. 2d 700 9

Edelman v. *Jordan;* No. 72-1410, decided March 25, 1974 8

Groundhog v. *Keeler*, 442 F. 2d 674 9

Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 6

Laramie v. *Nicholson* and *Johnson* v. *Lower Elwha Tribal Community*, 484 F. 2d 200 3,4,7,8

Luxon v. *Rosebud Sioux Tribe*, 455 F. 2d 698 9

Martinez v. *Southern Ute Tribe*, 249 F. 2d 915 9

McClanahan v. *Arizona State Tax Comm'n*, 411 U.S. 164 4

Menominee Tribe v. *United States*, 391 U.S. 404 5

Native American Church v. *Navajo Tribal Council*, 272 F. 2d 131 5

Scheuer v. *Rhodes* and *Krause* v. *Rhodes*, Nos. 72-914, 72-1318, decided April 17, 1974 7

Slattery v. *Arapahoe Tribal Council*, 453 F. 2d 278 8,9

Squire v. *Capoeman*, 351 U.S. 1 5

Thebo v. *Choctaw Tribe of Indiana*, 66 Fed. 372 5

Talton v. *Mayes*, 163 U.S. 376 5

Worcester v. *Georgia*, 6 Pet. 515 4

United States v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 4,7,8

Young, Ex parte, 209 U.S. 123 7

Constitution, statutes and regulations:

United States Constitution, Art. 1, Sec.8, cl. 3 4

Indian Civil Rights Act, Pub. L. 90-284, 82 Stat. 73, Title II of the Civil Rights Act of 1968, now 25 U.S.C. 1301-1303 1,4,5

28 U.S.C. 1343(4) 1,4,6,7,9

42 U.S.C. 1982 6

Miscellaneous:

Burnett, *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 Harvard Journal on Legislation 557 (1972) 6

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1281

MEL TONASKET, ET AL., PETITIONERS

v.

ALICE M. THOMPSON

NARCISSE NICHOLSON, JR., ET AL., PETITIONERS

v.

JUNE KAREN LARAMIE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to this Court's order of April 22, 1974, inviting the Solicitor General to express the views of the United States with respect to the pending petition for certiorari.

QUESTIONS PRESENTED

1. Whether the federal courts have jurisdiction under 28 U.S.C. 1343(4) to review violations of the Indian Civil Rights Act (25 U.S.C. 1301-1303) which are not reviewable by writ of habeas corpus.

2. Whether Congress, in enacting the Indian Civil Rights Act, waived the immunity from suit of Indian Tribes, and if so, whether that waiver extends to money judgments against the Tribes.

3. Whether tribal officers acting within the scope of their duties enjoy either absolute or qualified immunity from suit.

STATEMENT

The petition joins two cases which were decided by the court of appeals within a month of each other and which raise the same jurisdictional issues.

1. *Tonasket* v. *Thompson*

Mrs. Thompson's complaint (Pet. App. C, A11-A17), filed in the federal district court for the Eastern District of Washington against the Colville Confederated Tribe and 14 members of the Colville Business Council (the Tribal Council) "as members of the Colville Business Council," alleges that she was born in 1911 in the State of Washington and was enrolled as a member of the Colville Indian Tribe. Until 1953 she received per capita payments from the Tribe. In that year, according to the complaint, her name was improperly striken from the rolls of the Tribe on the ground that she had lost her American citizenship and had become a Canadian citizen. Mrs. Thompson alleges that this action was taken by the petitioners without giving her adequate procedural safeguards and was in error under *Afroyim* v. *Rusk*, 387 U.S. 253, since she had not lost her American citizenship by voting in a Canadian election. She further alleges that she applied for new enrollment in the Tribe but was turned down, in violation of 25 U.S.C. 1302(8), prohibiting an Indian Tribe from denying any person equal protection of its laws.

Mrs. Thompson prays that the court:

> (a) order the Tribe to pass an appropriate resolution to restore her to membership retroactively; and
>
> (b) render judgment in her favor against the Tribe and the named members of its enrollment committee for per capita payments she would have received since her disenrollment, together with 8 percent interest per annum, $5,000 attorney's fees, and costs.

The petitioners, by affidavits attached to a motion for summary judgment, stated that Mrs. Thompson had been removed from membership after notice and a hearing because she had resided in Canada for twenty years and under the Tribal Constitution had thereby abandoned her membership, regardless of questions of citizenship, and that re-enrollment, *i.e.*, adoption, is at the discretion of the Tribe.[1] Petitioners also moved to dismiss the complaint on the grounds that the federal court lacked jurisdiction over the defendants and the subject matter and that the complaint failed to state a claim upon which relief could be granted (Pet. 6-7).

The district court dismissed the complaint for lack of subject matter jurisdiction (Pet. 7; Br. in Opp. 4). The court of appeals reversed and remanded, *per curiam*, with references to its decisions in *Laramie* v. *Nicholson* and *Johnson* v. *Lower Elwha Tribal Community*, 484 F. 2d 200 (Pet. App. A).

2. *Nicholson* v. *Laramie*

In this case as in *Thompson* the complaint (Pet. App. C, A18-A22) filed in federal district court for the Eastern District of Washington is against the Colville Confederated

---

[1]See Pet. 4-7. We are lodging with the Clerk copies of petitioners' motions for summary judgment in *Thompson* and *Laramie*, together with the affidavits in support of the motions and the counter affidavits of Alice Thompson and Evelyn Laramie.

Tribe and named members of its Business Council, as members of the council. It alleges that the complainants, minors whose parents had been members of a Canadian tribe, were arbitrarily denied enrollment in the Colville Tribe after their membership in the Canadian tribe had been terminated. The plaintiffs pray for enrollment, back payments, costs and attorney's fees. The petitioners filed a motion for summary judgment stating that enrollment of persons who have been members of other tribes would be contrary to a tribal resolution approved by the Secretary of the Interior. The petitioners also moved to dismiss the complaint for lack of jurisdiction and failure to state a claim on which relief could be granted. The district court dismissed the complaint for lack of subject matter jurisdiction (Pet. App. A, A2). The court of appeals, in a two-page opinion (Pet. App. A, A2-A3), reversed and remanded. It held that the district court has jurisdiction over the case under 28 U.S.C. 1343(4) and cited with approval its decision in *Johnson* v. *Lower Elwha Tribal Community,* 484 F. 2d 200, which had held (*id.* at 203) that the Indian Civil Rights Act (25 U.S.C. 1301-1303) waives tribal immunity from suit.

DISCUSSION

1. Indian tribes are treated in the United States Constitution *in pari materiae* with states and foreign nations, Art. I, Sec. 8, cl. 3. This Court, while recognizing Congress' plenary authority over Indian tribes and trust responsibility toward them, has also recognized their residual sovereignty as governmental entities—a sovereignty predating the Constitution. *Worcester* v. *Georgia,* 6 Pet. 515; *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164. Indian tribes are therefore immune from suit unless Congress waives their immunity. *United States* v. *United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512. This immunity is perhaps more important for a tribe

than for a state or the federal government because of the very limited financial resources of most tribes—which affect both their ability to hire lawyers to defend suits and their ability to pay judgments. Accordingly, a waiver of the immunity of an Indian tribe must be in "plain and unambiguous terms," *Thebo* v. *Choctaw Tribe of Indiana*, 66 Fed. 372, 376 (C.A.8), as must any statute taking away tribal rights. See, *e.g., Menominee Tribe* v. *United States*, 391 U.S. 404; *Squire* v. *Capoeman*, 351 U.S. 1-7.

Because Indian tribes are neither the United States nor states, the requirements of the Bill of Rights have been held inapplicable to their actions in regard to their members. *Talton* v. *Mayes*, 163 U.S. 376; *Native American Church* v. *Navajo Tribal Council*, 272 F. 2d 131 (C.A. 10); see also *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553 (C.A. 8). But see *Colliflower* v. *Garland*, 342 F. 2d 369 (C.A. 9). In response to what was seen as a lack of constitutional safeguards for individual Indians vis-a-vis their tribes, Congress, in 1968, enacted the Indian Civil Rights Act (Pub. L. 90-284, 82 Stat. 73, Title II of the Civil Rights Act of 1968; now codified as 25 U.S.C. 1301-1303). That Act enumerates certain specific rights, many, but not all, in the area of criminal procedure, which are not to be abridged by tribal governments. Among the enumerated rights is the following:

No Indian tribe in exercising powers of self-government shall

* * * * *

> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law [25 U.S.C. 1302].

The only jurisdictional provision in the Act is 25 U.S.C. 1303 which provides:

> The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

The Act contains no specific provision for enforcement of rights that might be infringed without detention, nor does it contain any provision explicitly waiving tribal immunity from suit. This has left to the courts the duty of interpreting the Act in such a way as to make it effective, while still protecting Indian self-government. Both of these objectives are within the congressional intent. See Burnett, *An Historical Analysis of the 1968 'Indian Civil Rights' Act,* 9 Harvard Journal on Legislation 557 (1972).

2. In our view, the Court should grant the petition for certiorari in this case.

We agree with the court of appeals that federal review of violations of the Indian Civil Rights Act is not limited to writs of habeas corpus. Under 28 U.S.C. 1343(4) federal district courts have jurisdiction to hear cases commenced by any person "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." In *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, this Court invoked 28 U.S.C. 1343(4) as a jurisdictional basis for enforcing the rights secured by 42 U.S.C. 1982. In our view, that same Section similarly provides a proper jurisdictional base to protect the rights, in addition to those redressable by writ of habeas corpus, secured by the Indian Bill of Rights. Compare *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U.S. 388.

But neither Section 1343(4) nor the Indian Civil Rights Act purports to waive the immunity of Indian Tribes from suit. That immunity therefore remains and

protects the Tribes much as the Eleventh Amendment protects the states or the principle of sovereign immunity protects the United States. See *United States* v. *United States Fidelity & Guaranty Co., supra.* Moreover, for the same reasons that state and federal officers must have some personal immunity from suit in order to perform their duties without fear or harassment, tribal officers must be protected while acting within the scope of their duties. Compare *Barr* v. *Matteo,* 360 U.S. 564.

The causes of action at issue here may be analytically divided into two separate claims, each of which has two parts:

(1) the suits against the tribal officers

(a) for injunctive relief,
(b) for damages;

(2) the suits against the Tribe itself

(a) for injunctive relief,
(b) for damages.

The court of appeals, in remanding these case *in toto* and with reference to its opinion in *Lower Elwha, supra,* permits suit against the Tribe itself and apparently, so far as jurisdiction is concerned, would permit a money judgment against the Tribe. And nothing in its opinions would preclude a money judgment against tribal officers, without reference to any immunity of governmental officials. All of this, in our view, gives too little effect to the intent of Congress to protect tribal sovereignty and self-government as well as the rights of tribal members.

By analogy to *Ex Parte Young,* 209 U.S. 123, the district court had jurisdiction under 28 U.S.C. 1343(4) to entertain the suits for injunctive relief against the tribal officers. By analogy to *Scheuer* v. *Rhodes* and *Krause* v. *Rhodes,* Nos. 72-914 and 72-1318, decided April 17, 1974, in some circumstances, the court would also have jurisdiction to

entertain suits for monetary damages against tribal officers. But to the extent that the court of appeals' decisions sanction a claim for monetary damages against the Tribe itself, they are, in our view, inconsistent with *United States* v. *United States Fidelity & Guaranty Co., supra,* and, by analogy, with this Court's recent decision in *Edelman* v. *Jordan,* No. 72-1410, decided March 25, 1974. In the fourth situation—suits for injunctive relief against a Tribe—normal application of immunity rules would prohibit suit against the Tribe itself. See *United States* v. *United States Fidelity & Guaranty Co., supra; Edelman* v. *Jordan, supra.*

Thus, in our view, the district court properly dismissed the suits against the Tribe itself and the court of appeals erred in remanding those claims, and in suggesting that the Indian Civil Rights Act waives the immunity of the Tribe and its officers.

3. The decisions below add to the generally confused state of the law concerning the proper role of federal courts in enforcing the Indian Civil Rights Act. The Ninth Circuit has now in three cases (the instant cases and *Lower Elwha, supra)* held or suggested that since the enactment of the Indian Civil Rights Act neither Tribes nor their officers are immune from money judgments and that federal courts have broad jurisdiction to review tribal decisions. The Tenth Circuit, to the contrary, has taken a more restrictive, perhaps conflicting, view. In *Slattery* v. *Arapahoe Tribal Council,* 453 F. 2d 278, a case almost identical to *Nicholson* v. *Laramie,* that court affirmed the district court's dismissal of a suit brought by the mother of minor children alleging that the Tribe had arbitrarily refused their application for adoption. The court of appeals held that on the basis of the complaint, motion to dismiss, and affidavits in support of the motion, the facts alleged "are insufficient to bring into play

the Indian Bill of Rights, the rule of *Martinez* [*Martinez* v. *Southern Ute Tribe*, 249 F. 2d 915 (C.A. 10), holding that federal courts do not have jurisdiction over intratribal controversies] controls and the trial court was correct in its determination that it did not have jurisdiction." *Id.* at 282. See also the court's similar conclusion in *Groundhog* v. *Keeler*, 442 F. 2d 674 (C.A. 10).

The court of appeals for the Eighth Circuit has taken an intermediate position. In two cases seeking injunctive relief in connection with tribal elections, brought against the Tribes as such as well as other defendants, it found jurisdiction over the Tribe and tribal officers under 28 U.S.C. 1343(4). *Luxon* v. *Rosebud Sioux Tribe*, 455 F. 2d 698; *Daly* v. *United States*, 483 F. 2d 700. But neither case involved a claim for a money judgment. See also *Brown* v. *United States*, 486 F. 2d 658 (C.A. 8). In *Luxon*, *supra*, the court, contrary to the Tenth Circuit's decision in *Slattery*, *supra*, distinguished between its finding of jurisdiction and the separate question whether the complaint states a cause of action on which relief can be granted. On the latter question, but not the former, it remanded the case to the district court.

Thus, six years after the enactment of the Indian Civil Rights Act, and after considerable litigation, the jurisdiction of the federal courts to enforce the Act and the immunities of Tribes and tribal officers remains unclear. Tribes and tribal members need to know with more certainty the kinds of relief that federal courts can grant under the Act, and Tribes and tribal officers need to be protected from excessive assumptions of jurisdiction, contrary to principles of tribal sovereignty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

HARRY R. SACHSE,
Assistant to the Solicitor General.

AUGUST 1974.

DOJ-1974-08